

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

LIZA LAMELZA and	:	
NICOLINO LAMELZA,	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 18-1714
	:	
WAL-MART STORES EAST, LP and	:	
WAL-MART STORES, INC.	:	
Defendants.	:	

EXPLANATION AND ORDER

On July 11, 2017, Plaintiffs Liza and Nicolino Lamelza filed suit in the Philadelphia Court of Common Pleas. On April 23, 2018, Defendants Wal-Mart Stores East, LP and Wal-Mart Stores, Inc. (collectively “Wal-Mart”) removed the suit to federal court. The Lamelzas filed a motion to remand. I will grant the motion to remand because Wal-Mart’s removal was untimely.

BACKGROUND

The Lamelzas’ state court suit made allegations regarding an injury suffered by Liza Lamelza in the parking lot of a Wal-Mart store in King of Prussia, Pennsylvania. The Lamelzas sued both Wal-Mart and Lance Ransom, who they alleged was the King of Prussia Wal-Mart Store Manager at the time of the incident. The Lamelzas and Ransom are Pennsylvania citizens. Wal-Mart is incorporated in Delaware and has a principle place of business in Arkansas. On August 22, 2017, service was executed on Wal-Mart at the King of Prussia store by a sheriff. Wal-Mart alleges that the service was improper because it was given to an hourly employee, and that it was not aware of the litigation until September 28, 2017 when it received a notice of intent to enter a default judgment.

On October 5, Wal-Mart proceeded to answer the complaint and asserted that Ransom “was not employed at the subject Wal-Mart store at the time of the subject incident.” ECF No. 1, at 32. Eventually, Ransom filed a Motion for Judgment on the Pleadings to dismiss the claims against him. On April 3, 2018, the state court granted the motion and dismissed Ransom from the case. On April 23, 2018, Wal-Mart removed on the basis that Ransom “was fraudulently joined to prevent removal to federal Court.” *Id.* at 5. On May, 8, 2018, the Lamelzas filed a motion to remand.

DISCUSSION

“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant” 28 U.S.C. § 1441(a). Thus, if a federal court would have diversity jurisdiction over a case, it can be removed if the proper procedure is followed. Normally, to remove a state court case a defendant must file a notice of removal within 30 days of receiving the initial pleading. § 1446(b). But, an exception exists that allows a defendant to remove a case 30 days after it receives notice “from which it may *first* be ascertained that the case is one which is or has become removable.” § 1446(b)(3) (emphasis added).

Here, Wal-Mart clearly missed the typical 30-day window during which it could file for removal. Wal-Mart was served with the complaint on August 22, 2017,¹ and it did not remove until April 23, 2018. Wal-Mart instead argues that when that state court dismissed Ransom from the case, complete diversity was created—triggering the § 1446(b)(3) exception and giving Wal-

¹ Wal-Mart argues that it was not properly served on this date. Regardless, Wal-Mart clearly learned of the complaint on September 28, 2017 when it became aware of an impending default judgment. Even based on the later date, its removal was still well beyond 30 days.

Mart another 30 days to file for removal. Wal-Mart argues that Ransom was fraudulently joined² because he was not the manager of the Wal-Mart in question during the injury, and the state court decision made the fraudulent joinder apparent.

Wal-Mart's argument is wrong for two reasons. First, the § 1446(b)(3) exception is only triggered if a defendant receives notice that allows it to *first* ascertain that the case is removable. Therefore, the 30-day time limit begins once a defendant has enough information to determine that a party may have been fraudulently joined. *See Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 n.4 (7th Cir. 1992) (stating if a defendant could have discerned fraudulent joinder from the complaint, then service of the complaint begins the 30-day time limit); 14C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3731 (4th ed. 2018) (“[F]ederal district courts have required the notice of removal to be filed within 30 days of defendants' receipt of information indicating that there was a fraudulent joinder.”).

Here, Wal-Mart claims removal based on fraudulent joinder because Ransom did not work for the King of Prussia Wal-Mart store. However, Wal-Mart clearly could ascertain the possibility of fraudulent joinder when it answered the state court complaint on October 5, 2017. In its answer, Wal-Mart made the argument that Ransom did not work at the King of Prussia store and thus was not a proper defendant. ECF No. 1, at 32. Therefore, Wal-Mart knew of the possibility of fraudulent joinder when it answered the complaint, initiating the 30-day time

² Fraudulent joinder:

represents an exception to the requirement that removal be predicated solely upon complete diversity. In a suit with named defendants who are not of diverse citizenship from the plaintiff, the diverse defendant may still remove the action if it can establish that the non-diverse defendants were “fraudulently” named or joined solely to defeat diversity jurisdiction.

In re Briscoe, 448 F.3d 201, 215–16 (3d Cir. 2006) (citations omitted). Because I find that Wal-Mart's removal was untimely, further discussion of the law of fraudulent joinder or its merits in this case is unnecessary.

period for removal. *Accord Naef v. Masonite Corp.*, 923 F. Supp. 1504, 1512 (S.D. Ala. 1996) (finding that time at which defendant admitted that it was aware of the basis for its fraudulent joinder argument was when the 30-day removal period began). The state court’s dismissal of Ransom simply acknowledged an argument Wal-Mart had already identified, and it did not create another 30-day window for removal.

Second, if a defendant is dismissed based on a dispositive motion that is opposed by the plaintiff, and that dismissal creates diversity between the parties, it does not provide a basis for removal. Though the Third Circuit has not spoken definitively on this issue, there is a general consensus among lower courts that dismissal of a non-diverse defendant only creates a basis for removal if the dismissal is the product of a voluntary act by the plaintiff. *See In re Asbestos Prod. Liab. Litig. (No. VI)*, 801 F. Supp. 2d 337, 339 (E.D. Pa. 2011) (“[T]he ‘trend among the district courts in the Third Circuit . . . has been to require dismissal of a non-diverse defendant by voluntary act of the plaintiff as the basis for removal.’” (emphasis added) (quoting *Rubino v. Genuardi’s Inc.*, 2011 WL 344081 at *6 (E.D. Pa. Jan. 31, 2011))). Here, Ransom was dismissed pursuant to a contested Motion for Judgment on the Pleadings—not pursuant to a voluntary act by the Lamelzas. Hence, Ransom’s dismissal did not provide a basis for removal.

CONCLUSION

Based on the above reasoning, I will grant the Lamelzas’ motion to remand.

ORDER

AND NOW, this 11th _ day of June, 2018, it is **ORDERED** that Plaintiffs' Motion to Remand to State Court (ECF No. 9) is **GRANTED**. This action is **REMANDED** to the Philadelphia County Court of Common Pleas.

s/Anita B. Brody

ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to: